Supreme Court, U. S.
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80-300

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CHARLES K. VIELEHR, On Behalf of Himself and all Others Similarly Situated,
Petitioners,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeal of the State of California
Third Appellate District

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QUESTION PRESENTED

Whether the California Legislature may retroactively reduce the statutory rights of state employees to a return of interest on mandatory contributions to a public retirement system without impairing the obligation of the state's contract in violation of the United States Constitution, Article I, § 10?

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PETITION FOR WRIT OF CERTIORARI
To the Court of Appeal of the State of California
Third Appellate District

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Charles K. Vielehr, on behalf of himself and others similarly situated, the Petitioners herein, pray that a Writ of Certiorari be issued to review the judgment of the Court of Appeal of the State of California, in and for the Third Appellate District entered in the above-entitled action on March 26, 1980.

OPINIONS BELOW

The denial of the Petition for Hearing by the Supreme Court of the State of California is unreported and is presented in Appendix A hereto, *infra*, p. A-1. The opinion of the Court of Appeal for the State of California, in and

for the Third Appellate District is printed in Appendix B hereto, *infra*, pp. A-2 to A-7. The order of the Court of Appeal of the State of California in and for the Third Appellate District certifying the opinion for publication is printed at Appendix C hereto, *infra*, p. A-8. The judgment of the Superior Court of the State of California, in and for the County of Sacramento, is printed in Appendix D hereto, *infra*, pp. A-9 to A-10.

JURISDICTION

The opinion of the Court of Appeal of the State of California, in and for the Third Appellate District was entered on March 26, 1980. A timely Petition for Hearing before the Supreme Court of the State of California was denied on June 4, 1980 (Appendix A, *infra*, p. A-1). The jurisdiction of the Supreme Court is invoked under 28 United States Code § 1257(3).

STATUTE INVOLVED

Prior to December 1, 1968, the relevant provisions of the California Government Code provided:

> 20029. "Accumulated normal contributions" means the sum of all normal contributions standing to the credit of a member's individual account, and interest thereon. (Stats. 1945, Ch. 123 § 1)
>
> 20030. "Accumulated additional contributions" means the sum of all additional contributions standing to the credit of a member's individual account, and interest thereon. (Stats. 1945, Ch. 123 § 1)
>
> 20031. "Accumulated contributions" means accumulated normal contributions plus any accumulated additional contributions standing to the credit of a member's account; provided, however, that "accumulated contributions" as used in any provision of this part specifying a minimum amount of such contribu-

tions as a condition of the exercise of any right or entitlement to any benefit shall mean only accumulated normal contributions. (Stats. 1965, Ch. 1183 § 3)

Effective December 1, 1968, California Government Code Section 20031 was amended to read:

20031. "Accumulated contributions" means accumulated normal contributions plus any accumulated additional contributions standing to the credit of a member's account; provided, however, that "accumulated contributions" as used in any provision of this part specifying a minimum amount of such contributions as a condition of the exercise of any right or entitlement to any benefit shall mean only accumulated normal contributions, and provided, further, that for purposes of refund "accumulated contributions" shall not include any interest on such contributions after June 30 of the fiscal year preceding that in which the refund is accomplished.

(Stats. 1968, Ch. 941 § 1)

The United States Constitution, Article I, § 10, provides in relevant part:

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

STATEMENT OF CASE

Petitioner Charles K. Vielehr was an employee with the Board of Equalization of the State of California from February 8, 1968 to February 28, 1974. As a condition of his state employment, Petitioner was required to contribute

a certain percentage of his salary to the Public Employees' Retirement System (PERS). (California Government Code Sections 20012, 20303). Like all other PERS members, Petitioner received a number of benefits in return for the deduction made from his salary, including the right, upon termination of employment, to withdraw the contributions deducted from his salary. (California Government Code Section 20652). The principal benefits of PERS membership were a pension upon suffering a disability or upon reaching the designated retirement age while still a member of PERS. (California Government Code Section 20036).

Prior to December 1, 1968, public employees withdrawing from state service enjoyed the right to receive interest on their contributions through the date of withdrawal. (California Government Code Sections 20029-20031, *supra*). Effective December 1, 1968, the California Legislature amended the statute to provide upon withdrawal of accumulated contributions interest would be computed and paid through the June 30th of the fiscal year preceding that in which the refund was accomplished. (California Stats. 1968, Ch. 941 § 1, *supra*).

On February 28, 1974 Petitioner resigned from state service and requested from PERS a refund of his accumulated contributions. On March 22, 1974, he received a refund check from Respondent for $1,281.05, which amount did not include interest on his contributions from July 1, 1973, to which he would have been entitled under the law in effect at the time he commenced state service.

While the exact extent of the class affected by this lawsuit has not been ascertained because of the procedural posture of the case, that class is estimated to be in excess of 100,000 former public employees of the State of California.[1]

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[1]This figure is an estimate based upon Respondent's Answers to Interrogatories.

It is further estimated that members of that class are entitled to a return of unpaid interest on PERS contributions ranging from a few dollars to several hundred dollars, depending upon the amount of each individual's contributions and length of time between his or her termination of employment date and June 30th of the preceding year.[2]

Petitioner's contention that retroactive application of California Government Code Section 20031 impairs the obligation of contracts with PERS members employed by the state before, and withdrawing from state service after, December 1, 1968, was argued to the trial court on cross motions for summary judgment, and was determined adversely to Petitioner because the trial court granted Respondent's motion for summary judgment. (Appendix C, *infra*, p. A-8).

The same contract clause contention was raised in appeal to the Court of Appeal of the State of California, in and for the Third Appellate District, and was determined adversely to Petitioner by the Court's determination that government employees terminating state service "reject" their pension rights and therefore such rights are not characterized as retirement rights and not entitled to contract clause protection. (Appendix B, *infra*, p. A-2).

Further, in the Petition for Hearing in the Supreme Court of the State of California, the contract clause arguments were again raised. But, the Supreme Court of the State of California denied Petitioner's request for hearing. Appendix A, *infra*, p. A-1).

REASONS FOR GRANTING WRIT

This case involves the question whether thousands of public employees are entitled to the protection of the

[2]These estimates are based on the actual experience of Charles K. Vielehr, Plaintiff class representative and Stanley G. Trujillo, Plaintiff class member.

contract clause of the United States Constitution, for interest earned on mandatory contributions to a public employees' retirement system, the compensatory terms and conditions of which system have been long held under prior state law to form a contract for purposes of Article I, § 10 of the Constitution. Initially, Petitioner concedes that the state may prospectively apply the provisions of California Government Code Section 20031 to state employees who accepted and entered public employment after its effective date. The constitutional impropriety in that legislation relates to its retroactive application to public employees who were PERS member prior to December 1, 1968, and who withdrew contributions thereafter on a date other than June 30th of any succeeding year.

Petitioner contends the writ should be granted to correct the erroneous decision of the Third District Court of Appeal; to clarify the federal law regarding what constitutes a contract for purposes of Article I, § 10, which issue has not been discussed for some 40 years; and to forestall further legislative action abrogating pension rights of public employees.

Whether or not there is a contractual obligation subject to contract clause protection pursuant to the Federal Constitution is a question of federal law.

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." [citations omitted] (*State of Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685, 691).

An examination of the decisions of California's highest Court reveals an unbroken and undistinguishable chain of authority which supports Petitioner's contention that the earned compensation provisions of public employment are of a contractual nature and are entitled to contract clause protection.

Early in this century, the Supreme Court of California ruled that public employment retirement benefits were among those governmental obligations protected by the contract clause of the Federal Constitution. (*O'Dea v. Cook* 176 Cal. 659, 661-662 (1917). Statutorily created retirement rights were afforded the protection of the contract clause because those rights were considered part of the compensation an employee earned when he or she undertook to perform services for a public entity. (*Kern v. City of Long Beach* 29 Cal.2d 848, 853 (1947); *Dryden v. Board of Pension Commissioners* 6 Cal.2d 575, 579 (1936)). Moreover, for purposes of contract clause analysis, pension rights were deemed to vest upon the acceptance of public employment. *Miller v. State of California* 18 Cal.3d 808, 815 (1977); *Kern v. City of Long Beach, supra,* 29 Cal.3d at pp. 852, 855; *Dryden v. Board of Pension Commissioners, supra,* 6 Cal.2d at p. 579. See also *Packer v. Board of Retirement* 35 Cal.2d 212, 214 (1950); *Bodle v. Bodle* 76 Cal.App.3d 758, 765 (1978); *Santin v. Cranston* 250 Cal.App.2d 438 (1967); *Chapin v. City Commission* 149 Cal. App.2d 40, 43 (1957); *Holt v. Board of Police and Fire Commissioners* 86 Cal.App.2d 714, 717 (1948)). Other non-service retirement benefits which constitute a form of deferred compensation have also been deemed to vest upon acceptance of public employment and have been afforded judicial protection under the contract clause by California courts. (See, e.g., *Olson v. Cory* 27 Cal.3d 203 (1980) (cost of living increases); *California League of City Employee Associations v. Palos Verdes Library District* 87 Cal.App.

3d 135 (1978) (longevity salary increases, paid vacation time, paid sabbaticals); *Frank v. Board of Administration* 56 Cal.App.3d 236 (1976) (disability pension)).

Recently in *Olson v. Cory, supra,* the California Supreme Court said regarding judges' cost of living increases:

> "We recognize the often quoted language that public employment is not held by contract and therefore is not protected by the contract clause. (*Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134-135 [110 Cal.Rptr. 610]; see also *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150 [82 P.2d 434, 126 A.L.R. 838].) Those and other cases involve purported rights to remain in office or to continued public employment. On the other hand, we deal here with the right to compensation by persons serving their term of public office to which they have undisputed rights. '[P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution. . . .' (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799]; see also *California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 139 [150 Cal.Rptr. 739].) Promised compensation is one such protected right. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 308-309 [152 Cal.Rptr. 903, 591 P.2d 1].) Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. (*Id.,* at p. 314.) When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected. (*Sonoma County Organization of Public Employees v. County of Sonoma, supra,* 23 Cal.3d 296, 304, quoting from *Glendale City Employees Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 337-338 [124 Cal.Rptr. 513,

> 540 P.2d 609].) (3a) In the instant case the Legislature in 1969 adopted the full cost-of-living increase provision, binding the state to pay persons employed at the represented compensation for their terms of office." (27 Cal.3d at 208-209).

Notwithstanding all the above-cited authority to the contrary, the Court of Appeal, in and for the Third Appellate District erroneously relied upon the case of *Miller v. State of California, supra.* The holding in *Miller* was in accord with well settled principles of California law: the Legislature impairs no vested contractual rights of a public employee by changing mandatory retirement age because *insofar as the duration of public employment is concerned* "no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms or conditions fixed by law." (*Miller v. State of California, supra,* 18 Cal.3d at p. 813).

The Supreme Court for the State of California did not thereby categorically remove contract clause protection from all rights of public employment except "retirement" rights. To the contrary, the Supreme Court of California cited *Kern v. City of Long Beach, supra,* 29 Cal.2d at p. 853 to the effect that "public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of a salary which has been earned," and that, accordingly, "[s]ince a pension right is 'an integral portion of contemplated compensation' [citation omitted] it cannot be destroyed once it has vested without impairing a contractual obligation." (*Miller v. State of California, supra,* at p. 815). Moreover, again relying on *Kern v. City of Long Beach, supra,* that Court expressly distinguished pension from tenure rights in the following manner:

> "Pension rights, unlike tenure of civil service employment, *are deferred compensation earned immediately*

upon the performance of services for a public employer. . . ." (*Miller v. State of California, supra,* at p. 814). (Emphasis added)

This case notwithstanding, it seems clear that California law has consistently treated deferred forms of salary and compensation to be among those conditions of public employment which are entitled to contract clause protection.

Obviously, the right to a refund of PERS contributions, including interest thereon *is* a form of deferred compensation for services rendered, and was intended to be by the California Legislature. An employee's normal contributions to PERS are *mandatory* and constitute a certain percentage of his *salary.* (California Government Code Sections 20012, 20303). An employee's salary, of course, is compensation and the right to obtain a salary which has been earned is protected by the contract clause under California law. (California Government Code Section 20022; *Miller v. State of California, supra* 18 Cal.3d at p. 815; *Kern v. City of Long Beach, supra,* 29 Cal.2d at p. 853). In addition, an employee's contributions to PERS with interest earned thereon, make up part of the disability and service pensions payable to him by PERS. (California Government Code Sections 20200, et seq.; 20600, et seq.; 20650, et seq.). These pension rights are an integral portion of an employee's contemplated compensation, become vested contractual rights upon acceptance of employment, and are protected under the contract clause. (*Kern v. City of Long Beach, supra,* at p. 853; *Dryden v. Board of Pension Commissioners, supra,* 6 Cal.2d at p. 579).

Since California public employees have protected contractual rights in their salaries and to their pensions, it is clear they also have a protected contractual right to a refund of contributions paid out of their salaries toward their pensions. (cf. *Betts v. Board of Administration* 21 Cal.3d 859 (1978); *Dickey v. Retirement Board* 16 Cal.3d 745 (1976); *Kern v. City of Long Beach, supra* 29 Cal.2d

848; *Dryden v. Board of Pension Commissioners, supra,* 6 Cal.2d 575).

Thus, under California law, statutory rights to salary are protected, employees' contributions to pensions are protected, employees' salary increases are protected, certain rights to benefits are protected; but according to the Court of Appeal decision, the statutory right to interest on mandatory contributions is not protected by the contract clause. This conclusion is irrational.

While prior California law seems clear, this Court has not addressed the fundamental question presented in this case as to whether or not the rights involved are entitled to contract clause protection, since a series of cases during the late 1930's.

In *Phelps v. Board of Education* (1937) 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674, this Court held that the State Teacher's Tenure Act was not entitled to contract clause protection to the extent that it conferred or purported to confer indefinite tenure upon the effected employees of the school district. (cf. *Miller v. State of California,* 18 Cal.3d 808).

In *Dodge v. Board of Education* (1937) 302 U.S. 74, 58 S.Ct. 98, 82 L.Ed. 57, this Court held that a state enactment providing compulsory and voluntary retirement of teachers and for the payment of retirement annuities, was not a contract for purposes of the contract clause. There the Court made a distinction between legislation which merely declares a state policy and legislation which creates a contract which is entitled to contract clause protection. The Court found that the Miller Act, there in controversy, did not create a binding contract for the teachers of the state.

In both of the above-cited cases, *Phelps v. Board of Education, supra,* and *Dodge v. Board of Education, supra,* the Court relied on the decisions of the New Jersey and Illinois Courts respectively which had held that the statutes in-

volved did not create a binding contract. This distinction is critical as all of the above-cited California cases seem clearly to say that compensation benefits of employment and retirement are entitled to contract clause protection.

In *State of Indiana ex rel. Anderson v. Brand* (1938) 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685, this Court held that the Indiana Teacher's Tenure Law providing that contracts for further service of a teacher who had served under contract for five successive years or more, should be deemed to continue indefinitely, was a statute which created a contract binding upon the parties and which was entitled to contract clause protection. The Court relied heavily upon the holdings of the courts in Indiana which had long recognized that the employment of school teachers was contractual.

Thus, in the late 1930's this Court issued three opinions all relying heavily upon the interpretations of the state courts as to whether a contract existed while reserving in themselves the right to independently adjudicate that question.

The recent decisions of this Court involving the contract clause do not address the fundamental issue of whether or not the rights involved are entitled to contract clause protection, rather they measure the propriety or reasonableness of an impairment assuming the existence of a contract entitled to protection. (*Allied Structural Steel Company v. Spannaus* (1978) 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727; *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92).

Allied Structural Steel Company v. Spannaus, supra, however, is important for two reasons. First, the case held that Minnesota law altering *private* pension agreements between an employer and its employees was violative of the contract clause. And, secondly, because the dissent of

Justice Brennan does raise the issue of whether or not there was a contract for purposes of contract clause protection. We note, however, that Justice Brennan's distinction between the relieving of contractual obligations and the imposition of additional burdens is not here an issue, as this is a direct case of reduction of contract entitlement (the employee's loss of money) assuming the existence of a contract for purposes of the contract clause.

Because this case squarely presents the question of whether or not there is a contract for purposes of Article I, § 10, and because that question has not been directly addressed for some 40 years, it would seem an appropriate vehicle for clarification of the issues involved.

In terms of the importance of the decision to the state employees of the State of California, the Court of Appeal decision is of great significance. While the decision was limited to certain interest entitlements of public employees upon termination, the rationale of the Court, which totally avoids contract clause protection, would apply equally to the return of contributions themselves. If the decision of the Court of Appeal is not overturned by this Court, the state legislatures throughout this nation may use this case as authority for retroactive abrogation of the statutorily-created contractual rights of public employees. While this may be an attractive legislative solution to some of the pressing financial problems of certain public retirement programs, it is fundamentally unfair to so classify certain deferred compensation rights of public employees to avoid contract clause protection, and hence, expose them to legislative abrogation. At best it places the employee in a tenuous position in that there is little or no certainty that the promised statutory obligations of his public employer will be honored.

Suffice it to say, this case presents an issue worthy of this Court's attention.

Respectfully submitted,

JAMES P. CORN
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A Professional Corporation
Attorneys for Petitioner

(Appendices Follow)

APPENDIX A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jun 4 1980

I have this day filed Order

HEARING DENIED

In re: 3 Civ. No. 18334

Vielehr

vs.

State of California

Respectfully,

Clerk

APPENDIX B

In the Court of Appeal of the State of California
in and for the Third Appellate District
(Sacramento)

3 Civ. 18334
(Super. Ct. No. 250012)

CHARLES K. VIELEHR,
Plaintiff and Appellant,
v.
STATE OF CALIFORNIA,
Defendant and Respondent.

[Filed Mar. 26, 1980]

This a class action involving the validity of a 1968 legislative enactment which affected the amount of interest paid to members of the Public Employees Retirement System (PERS) who withdraw their PERS contributions in a lump sum upon leaving public service before retirement.

Prior to December 1, 1968, Government Code section 20031 provided for the payment of interest to a withdrawing member up to the precise date of withdrawal. In 1968 Assembly Bill 508 (Stats. 1968, ch. 941, operative Dec. 1, 1968) was enacted, section 1 of which amended Government Code section 20031 to provide for interest on PERS refunds only up to and including June 30 of the fiscal year preceding that in which the refund is accomplished.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

The basic issue is whether the legislation (AB 508) violated the "obligation of contracts" provisions of the federal and state Constitutions.[1] The trial court answered this question in the negative by granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. Plaintiff's appeal is from the ensuing judgment in favor of defendant.

Plaintiff commenced work for the state on February 8, 1968 and thereby became a member of PERS, to which he contributed a percentage of his salary. At that time, as now, plaintiff had the right to withdraw his contributions should he leave state service other than by retirement. (Gov. Code, § 20652.) He also had the right to receive interest on any such withdrawal up to the date of the actual withdrawal. (Gov. Code, §§ 20029, 20030, 20031.)

On February 28, 1974, plaintiff resigned and requested PERS to refund his accumulated contributions. On March 22, 1974, he was sent a refund check in the amount of $1,281.05, which did not include interest on his contributions for the period after July 1, 1973. The amount he was "short" due to AB 508 was $48.54. Plaintiff filed a claim with the State Board of Control on behalf of himself and others similarly situated requesting payment of interest to date of withdrawal on all refunds given to persons who were PERS members prior to December 1, 1968 (effective date of AB 508), and who withdraw their contributions thereafter on a day other than June 30 of any succeeding year. The claim was rejected by the board and this lawsuit followed.

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[1]Article I, Section 10, of the United States Constitution provides that "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." Article 1, section 9, of the California Constitution also bars any legislative impairment of contract obligations.

Plaintiff contends the sums of money claimed by the members of the class are retirement benefits or rights and as such are "protected" against state interference by the contract clauses of the federal and state Constitutions. We disagree.

The argument asserts that the legislation impaired retirement benefits, and in so doing violated the contract clauses of the constitutions, since the impairment was not "materially related to the theory of a sound pension system and its successful operation." This argument is based on cases which have held that acts of public agencies which modify or change *vested contractual pension rights* are permissible, but only if they "bear some material relation to the theory of a pension system and its successful operation. . . ." (Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131; see also Wallace v. City of Fresno (1954) 42 Cal.2d 180, 185.)

We have no quarrel with the law as set forth by plaintiff when applied to a proper fact situation. However, the legislation in question, properly viewed, is not concerned with a *retirement* benefit or right. The funds on deposit in a PERS member's account can be returned to him, with interest, only when he leaves public employment other than by retirement. (Gov. Code, §§ 20390, 20393.) When he thus terminates employment he must make an election, as provided by statute, whether to have his contributions returned or leave them on deposit until he reaches the age of retirement, at which time he will be paid a pension. (Gov. Code § 20393.) Should he elect to take his contributions, he leaves the system as a matter of law and ceases to be a member of PERS. (Gov. Code, § 20390.) He thus rejects any pension rights he had in PERS.

As we view that portion of Government Code section 20031, as amended by AB 508, relating to refund of accumulated contributions to a PERS member leaving state

service other than by retirement, the subject matter is *not* a retirement right. It is a right of public *employment,* not retirement. That is to say, a public employee has a statutory right to cancel or rescind any statutory right he has to retirement, and does so when he withdraws his accumulated contributions. He does such an act as an employee, not as a retiree.

An example of the distinction in the rights is seen in the case of Miller v. State of California (1977) 18 Cal.3d 808, in which the plaintiff contended he had a vested contractual right to continue employment to the previous mandatory retirement age 70 and thereby to qualify for a larger monthly pension than he would get at the lower mandatory retirement age which had been enacted by the Legislature during his tenure. The court rejected his contention. The court stated, inter alia, (at pp. 813-814) with respect to the contract clauses in the Constitutions: "[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar, as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. [Citations.] Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that '[t]he terms and conditions of civil service employment are fixed by statute and not by contract.' (Boren v. State Personnel Board (1951) 37 Cal.2d 634, 641 [234 P.2d 981]; see also Martin v. Henderson (1953) 40 Cal.2d 583, 590-591 [255 P.2d 416]; State v. Brotherhood of R.R. Trainmen (1951) 37 Cal.2d 412, 417 [232 P.2d 857]; Townsend v. County of Los Angeles (1975) 49 Cal.App.3d 263, 267-268 [122 Cal. Rptr. 500]; Gilmore v. Personnel Board (1958 161 Cal.App. 2d 439, 448-449 [326 P.2d 847]; Risley v. Bd. of Civil Service Commrs., supra.) Indeed, '[t]he statutory provi-

sions controlling the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith.' (Boren, supra, at p. 641.)

"In view of these long and well settled principles, we conclude that the power of the Legislature to reduce the tenure of plaintiff's civil service position and thereby to shorten his state service, by changing the mandatory retirement age was not and could not be limited by any contractual obligation."

The rule of *Miller* is, then, that public employment and the rights, duties, and conditions thereof are creatures of statute, not contract, and unless and until vested rights to *retirement* ripen into vested contractual rights, the Legislature may modify conditions of employment without violating *vested* pension rights which have become protected under the contract clauses of the Constitutions. (18 Cal.3d at pp. 815-817.)

In this case, the Legislature, through AB 508 has, in effect, diminished a right of employment—not a right of retirement.[2]

Plaintiff contends defendant failed to show in the trial court that the right to interest up to the day of withdrawal was "anything other than a vested contract right" entitled to protection under the contract clauses of the Constitutions. This alleged failure is asserted to invalidate the

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[2]The state maintains the purpose of AB 508 was to reduce administrative overhead in calculating the interest to the exact day of retirement and to use these savings to help pay for a cost-of-living increase in the retirement program. Plaintiff asserts this is a "fabrication." The *motive* behind, or the *purpose* of AB 508, is of no concern to us, so we do not deal with the arguments between the parties as to whether certain evidence of legislative intent on this point was properly admitted or judicially noticed, and, if so, its import.

summary judgment in favor of defendant, and also the denial of the motion for summary judgment in favor of plaintiff.

Plaintiffs have put the burden on the wrong party. It was plaintiff's burden at trial and it is his burden on appeal to show his *own* motion for summary judgment should have been granted. It is of no avail for plaintiff to repeat, over and over, as he does in his brief, that defendants do not show the interest abatement provisions of AB 508 met the tests which have been established to protect retirement rights. We have above decided, for reasons stated, that no retirement rights are involved in this matter. That is the key to the validity of the summary judgment for defendant. It was plaintiff, not defendant, who failed to meet a basic burden, i.e., showing there was a retirement right involved.

Defendant, although not an appellant, attempts to establish on appeal that the trial court lacked jurisdiction over the certified class represented by plaintiff, insofar as it included persons who requested refunds between December 1968 and May 8, 1973. We shall not deal with this assertion. Defendant prevailed in the trial court with an unqualified judgment in its favor. Consequently, it is not an "aggrieved party" injuriously affected by the judgment. Defendant is therefore not entitled to be heard as an appellant. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 118.)

The judgment is affirmed.

REGAN, Acting P. J.

We concur:

REYNOSO, J.

WATT, J.*

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*Assigned by the Chief Justice.

Appendix C

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California
In and for the Third Appellate District
(Sacramento)

3 Civil 18334
(Super. Ct. # 250012)

Charles K. Vielehr,
Plaintiff and Appellant,
v.
State of California,
Defendant and Respondent.

[Filed April 14, 1980]

CERTIFICATION FOR PUBLICATION

THE COURT:

For good cause it now appears that the opinion in the above-captioned case filed on March 26, 1980, should be published in the Official Reports and it is so ordered.

For the Court:

REGAN, Acting P.J.

REYNOSO, J.

APPENDIX D

Evelle J. Younger, Attorney General
of the State of California
Stephen J. Egan,
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-1113
Attorney for Defendants

In the Superior Court of the State of California
In and for the County of Sacramento

No. 250012

Charles Vielehr, on behalf of himself and all others similarly situated,

Plaintiff,

v.

State of California and its Controller, et al.,

Defendants.

[Filed Jan. 2, 1979]

Judgment

The Motion for Summary Judgment of defendants State of California, et al., came on regularly for hearing on December 11, 1978, before the Honorable Fred W. Marler, Jr., Judge of the Superior Court, presiding. Robert J. Sullivan, Esq., represented plaintiff, and Stephen J. Egan, Deputy Attorney General, represented the defendants.

The matter having been argued and submitted upon the record on file herein, and the Court having found that there is no just reason for delay in the entry of judgment,

It Is hereby Ordered, Adjuged, and Decreed That:

There is no triable issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Defendants shall recover their costs herein.

Dated: Jan. 2, 1979

Fred W. Marler, Jr.
Judge of the Superior Court

Attest:
J.A. Shapson, Clerk
By B. J. Straass
Deputy Clerk